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# CHARACTER, COMPETENCY, AND CONSTITUTIONALISM: DID THE BORK NOMINATION REPRESENT A FUNDAMENTAL SHIFT IN CONFIRMATION CRITERIA?

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## I. INTRODUCTION

Some constitutional scholars contend that with the reelection of Ronald Reagan, and his political opponent's perception that he was in a solid position to fashion the Supreme Court in his own image, the nomination and confirmation process for nominees to the Supreme Court experienced a fundamental transformation. These commentators argue that the Senate has altered the criteria by which it judges nominees to the Court, shifting its focus from nominees' personal character and professional competency to an emphasis upon their social and judicial philosophy—their “constitutionalism.” This shift from character and competency questions to constitutionalism concerns was most evident in the nomination, and the Senate's subsequent rejection, of Judge Robert Bork in 1987.<sup>1</sup>

Others disagree and claim that there has been no shift in confirmation criteria. The uniqueness of the Bork nomination, they argue, was due either to the distinctiveness of the nominee himself or represents the political ele-

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1. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 313, 346 (1990); CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM* 57 (1991); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1185 (1988); David J. Danelski, *Ideology As A Ground For The Rejection Of The Bork Nomination*, 84 NW. U. L. REV. 900, 920 (1990); John P. Frank, *Are the Justices Quasi-Legislators Now?*, 84 NW. U. L. REV. 921, 923 (1990); Steven Lubet, *Confirmation Ethics: President Reagan's Nominees to the United States Supreme Court*, 13 HARV. J.L. & PUB. POL'Y 229, 229-30 (1990); John Anthony Maltese, *The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices*, 72 JUDICATURE 338, 340, 347; L.A. Powe, Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 785 (1991); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not To Know*, 101 HARV. L. REV. 1213, 1213 (1988).

ment that is often present in the nomination process. They contend that when relevant actors perceive the stakes surrounding the confirmation of a particular nominee to be great, an explicit debate over judicial philosophy and constitutional interpretation becomes an acceptable part of the nomination struggle.<sup>2</sup>

The focus of this article is to test whether or not there has been a shift in confirmation criteria for nominees to the United States Supreme Court. We have isolated the period from 1985-1987 as the interval when the transformation in confirmation criteria was said to have been conceived, tested, and fully implemented during the nomination and rejection of Judge Bork.<sup>3</sup> The Bork nomination, therefore, either provides us with an example of a fundamental shift in confirmation criteria, or the former appellate judge was simply a casualty of political warfare.

We are asking two broader questions. First, were Robert Bork's confirmation hearings unique in the sense that the Senate Judiciary Committee shifted its attention away from more traditional questions of "character" and "competency" toward questions of "constitutionalism"? We distinguish between "traditional" queries, centering on personal character and professional competency, and those which focus on judicial philosophy and constitutional interpretation. For example, questions concentrating on character might revolve around evidence of illegality, impropriety, or improper association. Questions that concentrate on competency might explore the nominee's legal background or experience, "performance" on the bench (for instance, missing relevant precedent in a particular case), or professional evaluations. Those questions focusing on constitutionalism would include specific questions concerning interpretation: What is the nominee's

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2. See Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164-65, 1167-69 (1988); Robert W. Bennett, *Styles of Judging*, 84 NW. U. L. REV. 853, 853-54 (1990); John D. Felice & Herbert F. Weisberg, *The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988*, 77 KY. L.J. 509, 515 (1988-89); Henry Paul Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202, 1203, 1209 (1988); William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 HASTINGS CONST. L.Q. 399, 399-406 (1990); Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858, 859 (1990); D. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 108 (1990); Arlen Specter, *Concluding Address: On the Confirmation of a Supreme Court Justice*, 84 NW. U. L. REV. 1037, 1039 (1990) (Specter suggests that the Bork and Kennedy hearings established the precedent that judicial philosophy is an appropriate subject "for in-depth questioning by the Judiciary").

3. In the next section of the paper we discuss the development of this "changing" confirmation criteria. In no small part, if there has indeed been a shift in confirmation criteria, it follows closely the recommendations made by Laurence Tribe. LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985). The "incubation" of the criteria shift was well documented by Ethan Bronner. See generally ETHAN BRONNER, *BATTLE FOR JUSTICE* (1989).

understanding of a particular text? What is the nominee's interpretation of previous cases?

Second, if Bork's hearings were in fact unusual, were they so because of Bork himself and the events surrounding the Bork nomination, or do they signal an enduring shift in the method by which the Senate performs its advice and consent function? Do they at least suggest that there has been a change in the way the "question and answer" process is to be executed by the Senate?

This article seeks to answer, at least at a preliminary level, the questions posited above. First, we examine the arguments advanced by three groups: those who discuss the emergence of a strategy intended to stop President Reagan from transforming the Supreme Court; those who dispute the uniqueness and impact of the Bork nomination; and those who have previously studied the Senate's confirmation criteria to predict or explain how the Senate votes when confronting nominees to the Supreme Court.

Second, we employ a systematic content analysis to examine questions put to nominees before the Senate Judiciary Committee. In this essay, our objective is to investigate whether the Bork confirmation process had an effect—one that did not exist previously—on later confirmation hearings. Thus, we examine the kinds of questions put to Robert Bork by the Senate Judiciary Committee, determine how these questions might differ from those asked of several nominees who preceded Bork, and whether or not the nomination produced a unique pattern in those nominees that followed him—Anthony Kennedy, David Souter, and Clarence Thomas.

We discover that, on the one hand, there does not appear to be support for the claim that the Bork nomination changed the confirmation criteria. Although there was a heavy emphasis placed upon Bork's constitutional philosophy, it was not unique to the Bork confirmation process. In several confirmation hearings, including those of Thurgood Marshall, William Rehnquist, and Sandra Day O'Connor, the types of questions asked resemble those presented to Robert Bork. On the other hand, it is easy to see why there is a perception, particularly among Bork's supporters, that his confirmation hearings were unusual. Since the 1950s, of those nominees whose confirmations have been rejected, Bork stands alone as a casualty of his constitutional theory.

## II. PREVIOUS LITERATURE

Prior analyses of the Bork nomination and Senate confirmation criteria center around three issues. First, there are authors who argue that a strategy had been previously developed, tested, and fully implemented to defeat Judge Bork. Second, as the previous section indicates, while there is little

question that the confirmation experience of Bork was unique, competing arguments have been advanced regarding the impact of Bork's nomination and confirmation experience. Third, there are those who have previously studied the Senate's confirmation criteria and aspire either to explain or predict how the Senate will vote when confronting nominees to the Supreme Court.<sup>4</sup>

#### A. *The Bork Confirmation Experience—The Strategy Unfolds*

Following his election in 1980, President Reagan did not equivocate about his attempt to transform the federal judiciary, including the United States Supreme Court, in his own image. To accomplish this objective, the President appointed men and women to the federal bench who were "strict constructionists," "interpretivists," or "originalists"—jurists who, regardless of how they were identified, were judicial conservatives likely to counteract the constitutional revolution achieved by the Warren Court and, to no small degree, the Burger Court. Ethan Bronner observed that "Reagan supporters both in and outside the administration said often and loudly that their goal was to remake the federal judiciary, to undo the 'activism' of the preceding quarter century."<sup>5</sup>

With that objective in mind, President Reagan, during his first term, appointed judicial conservatives to the bench at the lower federal court level,<sup>6</sup> and filled his first vacancy on the Supreme Court—the seat opened by the retirement of Justice Potter Stewart—with the conservative Sandra Day O'Connor.<sup>7</sup>

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4. To distinguish between models that "predict" from models that "explain" Senate voting behavior, see Mark Silverstein & William Haltom, *Can There Be a Theory of Supreme Court Confirmations*, Address at the 1991 Annual Meeting of the Western Political Science Association (Mar. 21-23, 1991).

5. BRONNER, *supra* note 3, at 120; see Powe, *supra* note 1, at 781; Carol M. Rose, *Judicial Selection and the Mask of Nonpartisanship*, 84 NW. U. L. REV. 929, 930-31 (1990); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 944 (1990); Rayman L. Solomon, *Introduction: The Bork Nomination in Historical Perspective*, 84 NW. U. L. REV. 898, 898 (1990). There are, of course, differences between "strict constructionists," "interpretivists," and "originalists." For a source distinguishing these similar constitutional theories, see DANIEL DREISBACH, *REAL THREAT AND MERE SHADOWS* 27-31 (1987).

6. See J. CALVI & S. COLEMAN, *AMERICAN LAW AND LEGAL SYSTEMS* 46, 52 (1989). Richard Brisbin argues that "[d]uring 1981-1988 the Reagan administration consciously attempted to appoint federal judges who agreed with its policy agenda." Richard Brisbin, *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 1 (1990); W. John Moore indicates that President Bush picked right up where Reagan left off with the effort to appoint conservative judges and justices. Moore notes: "More than half of the nation's 828 federal appeals and district court judges were appointed by Reagan or Bush." W. John Moore, *Righting the Courts*, NAT'L J., Jan. 25, 1992, at 200.

7. William Louthan argues that Justice O'Connor is not a "swing vote" justice—like Justice Powell. WILLIAM LOUTHAN, *THE UNITED STATES SUPREME COURT* § 231 (1991). Justice

When President Reagan was re-elected in 1984, his opponents openly expressed their concern that the President might be successful in his attempt to recast the Supreme Court. Because many of the Justices on the Court were aging, and often not in good health, Reagan seemed to have an opportunity that few presidents enjoy—the power to appoint a majority of the Justices on the Supreme Court. Arguably, opposition to Reagan's efforts to fill the Court with judicial conservatives gave birth to a strategy to fortify the Senate's role in the confirmation process—a strategy that was fully implemented in Bork's defeat.

In 1985, prominent Harvard Law School professor, Laurence Tribe, published *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*—an excellent example of opposition to Reagan's transformation agenda.<sup>8</sup> Tribe's book was an unabashed plea to the United States Senate to challenge the President's efforts to reconstruct the Court. Tribe argues that several myths commonly surround the confirmation process. First, most Americans are attracted to the idea that the problems with the federal judiciary can be cured by simply appointing "strict constructionist" judges who will keep their own predilections out of the process of interpreting the Constitution.<sup>9</sup> Next, they mistakenly conclude that nominees to the Supreme Court shed their ideological affinity for, if not allegiance to, the presidents who appointed them to the Court. For the most part, Tribe argues, presidents are not surprised by the voting behavior of their nominees who, generally, "have been loyal to the ideals and perspectives of the men who have nominated them."<sup>10</sup> Finally, the public believes that the Senate should, and most often does, acquiesce to the President's selection unless the nominee is either incompetent or morally unfit to serve on the bench. Tribe notes that the Senate has vigorously questioned the nomination of several candidates—even to the extent of challenging the nominee's judicial philosophy.<sup>11</sup> Thus, Tribe argues, the Senate can go much further than simply inquiring into the nominee's character or competency as they did with Justice O'Connor. Tribe urges the Senate to examine and reject nominees who cannot defend their judicial philosophies, or whom individual Senators might otherwise find unacceptable.<sup>12</sup> Further, Tribe entreats presidents to work to achieve an ideological balance on the

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O'Connor's judicial philosophy has been likened to the other conservatives on the Court—Rehnquist, Kennedy, and Scalia. Brisbin, *supra* note 6, at 29.

8. See generally TRIBE, *supra* note 3.

9. *Id.* at 41.

10. *Id.* at 50-51.

11. *Id.* at 77, 86-89.

12. *Id.* at 93-100.

Court and implores Senators to check the president if the President fails to do so.<sup>13</sup>

The influence of direct appeals to the Senate is difficult to ignore. For example, Tribe, after his book was published, was asked to discuss his views with Democratic Senators. He went out to dinner with Senator Kennedy, Senator Biden, and Senator Metzenbaum and carefully forwarded his argument.<sup>14</sup> In many respects, Bronner notes, Tribe became the "intellectual architect of the opposition."<sup>15</sup>

In 1986, when Chief Justice Burger retired from the Supreme Court, President Reagan nominated Justice Rehnquist to fill the vacancy. And, when he nominated Justice Rehnquist, Reagan selected an appeals court judge, Antonin Scalia, with impressive credentials as a conservative jurist to fill Rehnquist's seat on the bench.<sup>16</sup> For many reasons, however, those opposed to Reagan's judicial strategy did not wish to pull out all the stops to defeat Rehnquist and Scalia.<sup>17</sup> That decision does not mean that Reagan's opponents were unsuccessful in testing the strategy. Although Scalia was easily and unanimously confirmed, the Senate forcefully questioned Justice Rehnquist. Rehnquist faced strict scrutiny from the Senate Judiciary Committee, and he received more negative votes than any sitting Justice in the Court's history.<sup>18</sup>

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13. *Id.* at 107. For a discussion of Tribe's important role in the Bork event, see Danelski, *supra* note 1, at 900-16; Powe, *supra* note 1, at 788-90; and Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 HASTINGS CONST. L.Q. 283-85 (1990).

14. BRONNER, *supra* note 3, at 132-33.

15. *Id.* at 127. Bronner describes the influence constitutional scholars like Tribe had through direct appeals to Senators to reevaluate their function in the confirmation process. Tribe's scholarly argument is different from political pressure placed upon Senators, by a myriad of interest groups and individuals, to put a halt to Ronald Reagan's efforts to transform the judiciary. See *infra* notes 26-30 and accompanying text for a more extensive discussion of the role of interest groups in the emerging "strategy."

16. Brisbin, *supra* note 6, at 28-29, looks at Scalia's public career and record on the court of appeals, and concludes that Scalia was appointed "to the Supreme Court because of his record of opinions and publications, his service for and connections to Republican administrations, and his personal character." *Id.* He is "a typical product of the Reagan administration's judicial selection process." *Id.*

17. BRONNER, *supra* note 3, at 145. Bronner discusses the strategy used by opponents of the Bork nomination and how it compares to the strategy employed to "oppose" Rehnquist and Scalia. *Id.* at 145-87.

18. See Powe, *supra* note 1, at 784. O'BRIEN, *supra* note 2, at 105, indicates the level of scrutiny that Rehnquist faced in 1986. The committee's final report for Rehnquist runs 114 pages. Scalia's is only 76 words. Despite the level of scrutiny faced by Justice Rehnquist, Professor Totenberg maintains that the Committee did not go far enough in 1986. She argues that they could not go much further precisely because the Senate did not investigate William Rehnquist fully enough in 1971. Since the really tough questions were not asked in 1971, they were likewise

Bronner argues that Kennedy, Biden, and Metzenbaum, among others, were masterful politicians who realized that despite their opposition, Rehnquist was likely to be confirmed as Chief Justice. Therefore, they waited patiently for a fight they could win. Their optimism was bolstered by three consequential skirmishes with the President: the opposition they garnered against Justice Rehnquist's elevation to Chief Justice, the near defeat of Reagan nominee Daniel Manion to the Seventh Circuit Court of Appeals, and the defeat of William Bradford Reynolds for Associate Attorney General. The Rehnquist, Manion, and Reynolds battles proved to be meaningful dress rehearsals, both organizationally and emotionally, for the battle ahead. The new nomination strategy had been formulated and tested.<sup>19</sup>

When Lewis Powell stepped down from the bench in 1987, President Reagan nominated appellate court judge Robert Bork to replace him. Bork's nomination was a battle that the opposition not only felt they could win but, argues Bruce Ackerman, they believed they had to win. Ackerman maintains that more than any other nominee, including O'Connor, Rehnquist, and Scalia, Robert Bork was the one jurist who could fully complete Reagan's transformation process.<sup>20</sup>

Robert Bork's nomination was the ideal test case for the strategy that Tribe and others so desperately wanted to implement. Opponents of Judge Bork asked the Senate to do more than rubber-stamp the President's nomination of a jurist who, by "traditional" criteria, was qualified to sit on the Supreme Court, and whose name had been recommended as a qualified nominee for every open seat on the Court for nearly a dozen years.<sup>21</sup>

Furthermore, Judiciary Committee members opposed to Bork's confirmation focused extensively upon his constitutional philosophy. Stephen Van Beek and Daryl Landy note that several Senators actually changed their method of scrutiny.<sup>22</sup> For example, during the O'Connor hearings,

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not resolved in 1986. Thus, with regard to the particular charge that Rehnquist had harassed and intimidated black voters in the 1960s, she concludes that either the Chief Justice was left unfairly with a cloud over his head, or he had lied under oath. Totenberg, *supra* note 1, at 1215.

19. BRONNER, *supra* note 3, at 134-35. Judith Lichtman, *Public Interest Groups and the Bork Nomination*, 84 NW. U. L. REV. 978, 978-79 (1990) argues that the Bork hearings are much different than the second Rehnquist hearings. With Bork, the battle lines were drawn quickly and the intensity of interest group opposition was evident. Further, she notes that the cooperation between media, interest groups, and the Senate was "extraordinary." *Id.*

20. Ackerman, *supra* note 2, at 1165.

21. Bob Woodward and Scott Armstrong argue that Bork was given serious consideration during the Ford administration for the seat on the Court eventually filled by John Paul Stevens. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 400 (1979).

22. Van Beek & Landy, *Toward a Standard of Consent: The Role of the U.S. Senate in Considering Supreme Court Nominees*, Address at the 1991 Annual Meeting of the Western Political Science Association, 16-20 (Mar. 21-23, 1991).



Democratic Senators Biden and Kennedy insisted that they would focus upon whether or not the nominee possessed good moral character, was free of conflict of interest, and would faithfully uphold the Constitution. Senator Kennedy commended the nomination and chided interest groups who opposed the nomination over the single issue of abortion. Senator Biden proclaimed that, while O'Connor would be examined in order to discover her judicial philosophy, no litmus test would be given for her qualification.

However, during the Bork confirmation hearings, Biden insisted that "[i]n passing on this nomination to the Supreme Court, we must also pass judgment on whether or not your particular philosophy is an appropriate one at this time in our history."<sup>23</sup> Van Beek and Landy argued that Senator Kennedy opposed the nomination precisely because of Bork's position on a number of controversial constitutional issues; "seeming to do what he had criticized the O'Connor opposition for doing earlier."<sup>24</sup> Judging from the results, the timing of the opposition "strategy" was perfect. Not only was the Bork confirmation process quite unusual, but also he was soundly defeated.

### *B. The Impact of the Bork Event: Aberrational or Trend-Setting?*

What were the repercussions of the strategy to defeat Judge Bork? Did Bork prove to be an unusually rare target, or had opponents of Ronald Reagan's efforts to transform the Supreme Court developed a strategy that would radically change the Senate's confirmation criteria?

There are numerous reasons why some constitutional scholars conclude that, apart from the question of its long range impact, the Bork nomination process was unique. First, scores of interest groups participated in the process. William Myers notes that participation by interest groups in the nomination process is not in and of itself unusual.<sup>25</sup> However, it is estimated that 150-300 interest groups were involved in the Bork confirmation pro-

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23. *Id.*

24. *Id.* at 17-18. Van Beek and Landy do note that this shift toward unabashed partisan behavior was not limited to Bork's opponents. They also indicate that Senator Thurmond shifted from polite endorsement of Judge O'Connor to a lengthy opening statement that extolled the qualifications of Judge Bork. With Bork, Thurmond made a point of arguing that presidential nominees should come to the Senate with presumption, and his questions were intended to deflect much of the opposition engendered because of Bork's "paper trail." Simson, *supra* note 13, at 283-85, notes that, in the Bork hearings, the Senate fiercely considered the larger debate about the role the institution should play in the process. Some Senators maintained that they should defer to the President. Others held that the Senate is an equal partner with the Chief Executive regarding the judiciary. *Id.*

25. Myers, *supra* note 2, at 402.

cess.<sup>26</sup> Even if interest group participation is not unusual, Myers distinguishes the sophistication and intensity of those interest groups' intent on defeating Judge Bork from other interest groups involved in the confirmation of Justices.<sup>27</sup> Christine DeGregorio and Jack Rossotti also argue that the interest groups engaged in an outside, or "going public," strategy to educate the people why they should oppose Judge Bork and how to make their Senators aware of their opinions.<sup>28</sup> Bonner's reference to interest groups added to his argument that Bork's opponents were masterful politicians who conducted their campaign against Bork using many of the same tactics that Vice President Bush's campaign employed to defeat Governor Dukakis in the 1988 presidential election.<sup>29</sup>

Second, the Bork nomination was unique in the level of media attention it received. The hearings were held in the Russell Senate Office Building Caucus Room—the same room where the Watergate hearings and Iran-Contra hearings took place. Television and radio broadcast much of the hearings live, and press corps representing all types of media descended upon Washington.<sup>30</sup>

Third, the nomination process was unique because of Judge Bork's extensive testimony before the committee and the candor he displayed in answering questions. Myers observes that Bork testified for thirty hours before the committee over the course of five days. Steven Lubet notes the range of questions Bork answered during the confirmation hearings and the

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26. DeGregorio & Rossotti, *Resources, Attitudes and Strategies: Interest Group Participation in the Bork Confirmation Process*, at the 1991 Annual Meeting of the Western Political Science Association, March 22, 1991, at 1; see also PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE* 73-103 (1990).

27. Myers, *supra* note 2, at 402. See the argument advanced by MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING* (1989) and O'BRIEN, *supra* note 2, at 108.

28. DeGregorio & Rossotti, *supra* note 26, at 7. They note that included in the technique of "going public," is: "The use of promotional advertisements, opinion pieces in the press, direct mail campaigns, '1-900 numbers' and guest appearances on talk shows." *Id.* These techniques, they argue, "are all ways to educate and activate a potentially interested public. The push and pull over whether or not to confirm Judge Bork included all of these techniques, and the public was unusually attentive to the issue." *Id.*

29. See Bronner's analysis and description of the campaign against Judge Bork, *supra* note 3, at 145-87. Scholars do debate the success of the interest group action. Shapiro, *supra* note 5, at 935-46, argues that interest groups play a small role in the nominating and confirmation process. Stephen L. Carter, in *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962, 964 (1990), agrees that interest groups do wield comparatively little influence on the process; but, he argues, they are almost always more passionate about things than the Senators, and they are most concerned with how the nominee will vote rather than whether or not he or she will be a good judge. Nelson W. Polsby, in *Public Opinion is Led*, 84 NW. U. L. REV. 1031, 1032 (1990), observes that the anti-Bork campaign was successful in turning public opinion against the jurist.

30. Myers, *supra* note 2, at 400. For a contrast of the media's participation in the Bork hearings to the Kennedy hearings, see O'BRIEN, *supra* note 2, at 112.

depth with which Bork answered as a distinguishing feature of the confirmation.<sup>31</sup>

Finally, many writers maintain that the Bork confirmation process was unique because of the emphasis placed upon Bork's constitutional philosophy. William Louthan argues that Bork was not rejected by the Senate because of the more "traditional" criteria of faulty character or judicial incompetency. Louthan maintains Bork was rejected on ideological grounds—he was perceived by many in the Senate to be out of the mainstream and dangerous.<sup>32</sup> Myers insists that, in the Bork nomination, character and competency were not issues at all; the only important issue was his judicial philosophy.<sup>33</sup> Stephen Wasby and Christopher Wolfe agree with this conclusion. Wasby writes that ideology became a major factor in the nomination.<sup>34</sup> Wolfe argues that the key to Bork's defeat was that activists made his nomination a test of "certain modern, activist cases."<sup>35</sup>

If Louthan, Myers, Wasby, Wolfe, and others are correct,<sup>36</sup> and the Bork nomination was different from previous nominations, in part, because of the unprecedented attention given to Bork's constitutional philosophy, then does Bork's nomination represent a change in the way the confirmation game is played? There is substantial disagreement on this point.

Some constitutional scholars argue that the Bork nomination has altered the criteria by which the Senate judges nominees to the Court, shifting from a focus on their personal character and professional competency to an emphasis upon their social and judicial philosophy. Paul Freund argues that Bork's nomination opened the door for Senators to move away from party and region as important variables in their decision making to social

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31. Lubet, *supra* note 1, at 229-30. "Judge Bork simply spoke his mind." *Id.* at 229. There are, of course, other reasons why the Bork event was unique. As indicated above, Simson maintains that the Bork nomination forced the Senate to once again consider the role the institution should play in the process. Lawrence C. Marshall argues that, if nothing else, the Bork hearings allowed for a public debate regarding fundamental questions about legal scholarship. Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 832-34 (1990). There are those who hold, Marshall explains, that the Bork nomination will have a chilling effect on either good scholarship, by those scholars who are ambitious to participate in the public arena, or upon selecting excellent nominees who have been controversial scholars. *Id.*

32. LOUTHAN, *supra* note 7, at 221.

33. Myers, *supra* note 2, at 401.

34. STEVEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 132 (1988).

35. WOLFE, *supra* note 1, at 57.

36. Rose, *supra* note 5, at 929, argues that the Bork event was unique because the big figleaf fell. Rather than privately opposing Bork because of his ideology, and then manufacturing another "nonpartisan" reason for rejecting the judge, several Senators publically voiced their opposition to Bork based upon his constitutional philosophy. See Dennis J. Hutchinson, *A Comment on Danelski*, 84 NW. U. L. REV. 925, 926-27 (1990).

and judicial philosophy. In fact, Freund indicates that the Bork nomination actually represents a third phase in Senate confirmation criteria. The first is an examination of character and competency; the second is an emphasis upon the party and region of the nominee; and the third is toward inquiry into the nominee's social and judicial philosophy.<sup>37</sup> The Bork hearings will likely become the norm—"at least in potentially 'transformative' situations."<sup>38</sup>

Others reject the argument that the Bork nomination represents a fundamental shift in the Senate's confirmation criteria. If the Bork nomination was unique it was because the nominee, placed in the context of this particular nomination, was himself unique. Ackerman contends that Supreme Court nominees are either competent, thorough professionals or politicians in judge's clothing. Bork, argues Ackerman, was neither. Instead, he was the one jurist who symbolized Ronald Reagan's aspiration to rival Franklin Roosevelt's success in revolutionizing constitutional law by means of transformative appointments to the Supreme Court. The Bork nomination was unique, and therefore, not trend-setting, precisely because of the unique qualifications of the nominee.<sup>39</sup> Henry Monaghan concurs with Ackerman's position. The Bork nomination was an aberration. Monaghan argues that the Bork nomination signaled a return by the Senate to aggressive, adversarial inquiry. The Scalia and Kennedy nominations, which resulted in unanimous confirmations reveal much more than the Bork nomination does. Their overwhelming confirmations indicate that the Senate has limited ability to quash a presidential nomination unless the person is unusually controversial.<sup>40</sup> With Bork, Monaghan maintains, the Senate was spoiling for a fight; with Anthony Kennedy, however, the Senate went out of its way to avoid one. He concludes that Kennedy's nomination and confirmation are the norm.<sup>41</sup>

Others have evaluated the evidence and simply are not sure of the long range impact the Bork nomination will have on confirmation criteria. Stephen Carter believes that, after the Bork experience, the role of the Senate is very much up in the air. Carter notes:

The Senate, unable to agree on the precise role that it should play in the selection process, now finds itself trapped between the notion

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37. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives* 101 HARV. L. REV. 1146, 1146-47 (1988).

38. Lubet, *supra* note 1, at 230 (citing Grover Rees, III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 913 (1983)).

39. Ackerman, *supra* note 2, at 1165.

40. Monaghan, *supra* note 2, at 1203.

41. *Id.* at 1209.

that it should act to enforce a set of professional standards, reviewing nominees only to ensure that they possess proper qualifications, and the idea that it should inquire deeply into the substantive judicial philosophy of each nominee, to keep from the Court those whose constitutional visions are too extreme for the American people to stomach.<sup>42</sup>

Nina Totenberg argues that the nomination of Judge Bork affected the process. Previously, a president would put forth a nominee, expect relatively easy confirmation from the Senate, and then, only later, would the public find out about the Justice's potentially dangerous views. The Bork nomination, notes Totenberg, moved the Senate in the right direction. She is unclear, however, whether or not the Bork confirmation process was "aberrational or trend-setting."<sup>43</sup>

What of Robert Bork, the nominee who was rejected by the Senate in 1987? Bork admits that there are factors associated with his nomination that make it aberrational: President Reagan was a lame duck president who had been badly damaged by the Iran-Contra affair. He had lost control of the Senate in 1986. And, argues Bork, liberals in the Senate felt that his nomination had to be stopped. As a result of his previous writings, he was "the most visible proponent of adhering to what the Constitution actually says and of pointing out that where the Constitution is silent, the people must decide through legislation."<sup>44</sup> Further, Bork believes that the coalition that emerged to oppose his nomination could not often reach that peak of frenzy; nor could the Senate "stage too many of these circuses consecutively." But, notes Bork, the precedent for inquiring fully into a nominee's views has been set. Justice Kennedy was, to a lesser degree, questioned about his views and felt obliged to give answers. Bork concludes:

When some of the groups wanted to mount just such a campaign against Justice Kennedy, one senator said, "Nobody wants to go through that again. There's just too much blood on the floor." But, after some time has passed, they may well be able to mount such a campaign against a future nominee.<sup>45</sup>

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42. Carter, *supra* note 1, at 1185.

43. Totenberg, *supra* note 1, at 1213. As indicated above, Rose, *supra* note 5, at 929, argues that the Bork event was unique because senators voiced their ideological concerns with the judge rather than hiding behind some issue of character or competency. Do the Bork hearings represent ongoing change? The failed nomination of conservative Judge Douglas Ginsburg, who was rejected not because of his ideology, but because he had used marijuana, suggests otherwise to Rose.

44. BORK, *supra* note 1, at 345.

45. *Id.* at 346.

Although Bork recognizes the special and unique nature of his nomination, he likewise believes that a dangerous precedent was established during his confirmation process. While confirmations like his own may not become the norm, they are likely to reoccur when the nomination is for a seat on the Court that is perceived to be particularly important or if a given nominee is particularly controversial.<sup>46</sup>

### C. *Studying the Confirmation Process*

Quite apart from the Bork confirmation event, various authors have written specifically about the nomination and confirmation process.<sup>47</sup> However, much of the important literature addressing the confirmation of Supreme Court nominees focuses upon the outcome of the process and not the process itself. As a result, this type of literature does not address the impact the Bork hearings might or might not have on the process in future confirmation hearings.

John Felice and Herbert Weisberg, for example, observe that one of the hypotheses to emerge from the Bork hearings is that the hearings have opened the door for "intensive screening and questioning of candidate's ideological beliefs."<sup>48</sup> Felice and Weisberg do not go on to test the hypothesis, but do contend that the ideological make-up of Senators is an accurate barometer of voting behavior in controversial nominations. Even when controlling for partisanship and region, ideology is the most consistent factor over time.<sup>49</sup>

Charles Cameron, Albert Cover, and Jeffrey Segal note that most confirmation votes are fairly secure. Some confirmations, Bork's as example, are

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46. *Id.* at 313. Bork relates that that is why he refused to withdraw his name from consideration by the full Senate. He argues that his confirmation experience was "an unprecedented event. The process of confirming Justices for our nation's highest Court has been transformed in a way that should not, indeed must not be permitted to occur ever again." *Id.*

47. See generally, HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* (1985); LAWRENCE BAUM, *THE SUPREME COURT* (1981); O'BRIEN, *supra* note 2; DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* (1976); Gregory A. Caldeira, *Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests*, 77 KY. L.J. 532 (1989); Felice & Weisberg, *supra* note 2; Jeffrey Segal, *Senate Confirmations of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987); Charles M. Cameron et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992); Donald R. Songer, *The Relevance of Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927 (1976); George Watson & John Stookey, *Supreme Court Confirmation Hearings: A View From the Senate*, 71 JUDICATURE 186 (1988); WASBY, *supra* note 32.

48. Felice & Weisberg, *supra* note 2, at 510.

49. *Id.* at 515. They do note that the Bork vote was aberrational in that party affiliation was the most powerful predictor—his rejection did not come, despite the conclusions of many commentators, from the strict ideological polarization. *Id.* at 523.

marginally to extremely contentious. They argue that some of the previous literature evaluating Senate confirmation votes reveals that the ideological make-up of Senators plays a substantial role in controversial votes. However, these previous studies do not, they contend, examine the nominees to the Court, and, because they restrict themselves to controversial votes, cannot tell if a particular nomination will be contentious or not.<sup>50</sup> Cameron, Cover, and Segal conclude that confirmation is decisively affected by the ideological distance between Senators and nominees. Equally important are the qualifications of the nominees.<sup>51</sup>

In their study of Ronald Reagan's nominations to the Supreme Court before Bork, Charles Watson and John Stookey acknowledge that controversial nominations are more engrossing than noncontroversial nominations; only in controversial nominations is the outcome ever in doubt. Unlike most studies, however, they focus on the confirmation process rather than attempting to predict the outcome of Senate confirmation voting.<sup>52</sup>

Watson and Stookey argue that, because the confirmation hearings are really the fourth step in the confirmation process—Senators are deluged with information about the nominee and undergo a personal interview with the nominee before the hearings—Senators often have made up their mind how they will vote before the hearings actually begin. Thus, during the hearings, a Senator may play a variety of roles. First, he may be an evaluator—that rare Senator who has not made up his mind and for whom the hearings weigh heavily in the decision making process. Second, she might be a validator—a Senator who has made a preliminary decision on the nominee and who wants to use the hearings to confirm that opinion. Third, a Senator might be a partisan—one who has already decided how he will vote and uses the hearings to press partisan views and help the nominee. Fourth, one might be an educator—a Senator who has made up her mind but who uses the hearings to educate the committee, the Senate at large, the President, the press, or the public. Finally, a Senator might be an advertiser who, much like an educator, aims to publicize a particular point of view in order to inform rather than to persuade.<sup>53</sup>

Although they find that the two most important factors in the confirmation process are the Senate's usual inclination to support the President's nominee and the nominee's ideology, they report that the level of contro-

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50. Cameron et al., *supra* note 47, at 97-98.

51. *Id.* at 530-31. In their recent study, Segal, Cameron, & Cover, *supra* note 47, at 113-14, the authors examine several variables. They found that the votes of Senators are highly dependent upon the ideological difference between a Senator's constituents and presidential nominees. *Id.*

52. Watson & Stookey, *supra* note 47, at 186.

53. *Id.* at 190-93.

versy inherent in a given nomination changes a given Senator's behavior. A Senator is more likely to become an evaluator or validator if the situation or the nominee generates a high level of controversy. In the case of Judge Bork, where both the stakes were high and the nominee came with a controversial paper trail, it was enough to override the presumption of acceptance that Reagan enjoyed in his previous nominations.<sup>54</sup>

John Frank argues that Senators have employed five different approaches to considering judicial nominations. First, there are enthusiastic supporters of the nominee. Second, there are those who may or may not like the nominee but defer to the President. Third, there are those Senators Frank calls "dissemblers" who oppose the nominee on ideological grounds. They are concerned with the way a nominee will vote in important cases. However, the dissembler will find some reason other than ideology to dump the nominee. Fourth, there are rare "outright ideological attacks." Fifth, as in the Bork nomination, the Senators can engage in an out-and-out examination of the nominee's ideology.<sup>55</sup>

#### D. Unresolved Questions

After a brief review of the literature surrounding the nomination and defeat of Robert Bork, a number of observations are evident. First, while there is little dispute that Bork's nomination was unique, there is substantial disagreement regarding the impact of the nomination on the confirmation process. Freund, Lubet, Wolfe, and, to some extent, Bork argue that the Bork confirmation process opened a Pandora's box. They claim that nominations will no longer be evaluated in terms of the nominee's character or competency. Rather, future nominees will be forced to undergo strict scrutiny regarding their respective judicial philosophies. And if, as with Bork, the nominees have written extensively and provocatively, the weight of their own scholarship will likely be too much for them to bear. Others, like Ackerman and Monaghan, disagree. There have been controversial nominations in the past and, like Bork, these nominees have faced intense scrutiny

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54. John Stookey & George Watson, *The Bork Hearing: Rocks and Roles*, 71 JUDICATURE 194, 196 (1988).

55. Frank, *supra* note 1, at 921-24. Van Beek & Landy, *supra* note 22, at 8-14, also examine the process of Senate confirmation hearings. They reveal that the Judiciary Committee has been asking nominees four types of questions: first, "procedural" questions—those that emphasize the nominee's prior commitments, if any, to the nominating president; second, questions regarding the nominee's integrity or prior conduct; third, questions regarding the nominee's past record on the bench, in government, in private practice, in academic writings, or in speeches; fourth, questions regarding the nominee's judicial philosophy—the nominee's views on the role of the Court and constitutional interpretation. See Madeline Morris, *The Grammar of Advise and Consent: Senate Confirmation of Supreme Court Nominees*, 38 DRAKE L. REV. 863, 867 (1989).



from the Senate. Further, to make a case for the unique treatment of Judge Bork is to make a similar case that his confirmation process was aberrational. Given that the seat that opened after the retirement of Lewis Powell was uniquely important, and because Bork represented the complete transformation of the Court into the image of President Reagan, his opponents felt he must be defeated. However, judging from the treatment of Justice Scalia and Justice Kennedy, they argue that the Bork nomination was very much the exception and not the rule.

As a result of the Bork hearings, one might ask several questions: Is the process different than it was before? Has the nature of the question and answer process in Senate confirmation hearings changed? Has the Senate shifted its confirmation criteria from closely monitoring a nominee's character and competency to a rigid analysis of the nominee's "constitutionalism"? Even if Senators typically go into the hearings with their minds made up, will they, in the future, predominately ask questions associated with a nominee's judicial philosophy rather than important but perhaps more routine questions of character and competency? Or, is it possible that Bork represents no change whatsoever, that the Senate typically focuses upon a nominee's judicial philosophy?

The second observation is that previous analyses of the confirmation process fail to answer the questions articulated above. Typically, these analyses are concerned with the outcome of a given confirmation vote rather than with the process. Further, when they do study the impact and role of "ideology"—whether it be the ideologies of Senators or nominees—they either look at how the participant in question votes or some outside assessment of the participant's performance in the Senate or on the bench. Neither Felice and Weisberg, nor Cameron, Cover, and Segal study the process to test for the emergence of "constitutionalism" as a variable.

Those studies that look at the process rather than emphasizing outcome, however, do identify how Senators act in controversial and noncontroversial nominations. They conclude that in controversial nominations Senators often act differently. They become more overtly partisan proponents of the nominee, partisan opponents of the nominee, or "evaluators"—those who have not made up their minds and for whom the hearings carry a great deal of weight.

One might speculate, building upon the work of those who study the confirmation process, that one of the consequences of senatorial behavior changes during controversial nominations is that the process will be different. Thus, there is the need to address the litany of questions articulated above.

### III. THE STUDY

#### A. Methodology

Our objective in this article is to look at the ramifications of the strategy used to defeat Judge Bork. Specifically, we address the tactic of scrutinizing a particular nominee's constitutional philosophy. It is our desire to test whether or not the strategy was orthodox prior to Bork. If not, did the Bork event effectively change the nature of the confirmation game by permitting Senators to focus upon "constitutionalism" rather than more traditional questions of character and competency? Therefore, we need to determine if there was a period when the Senate ever failed to emphasize "constitutionalism." Was "traditional" inquiry by the Senate Judiciary Committee limited to questions of character and competency or did the Bork confirmation experience prompt a substantial re-orientation of the type of questions asked during the hearings?

To test whether or not there has been a change in confirmation criteria, we initially set out to do a content analysis of the Senate confirmation hearings of Justice John Paul Stevens and Justice David Souter. We selected Stevens and Souter for a number of reasons. First, we wanted to look at the confirmation hearings of a Justice that preceded the "strategy" and one that post-dated its execution. Second, we excluded the confirmation hearings of Justice Rehnquist and Judge Scalia for the reasons given above. While the "strategy" was developing, opponents of Reagan's efforts to transform the Court realized that they could not defeat Scalia or Rehnquist. Third, we excluded Justice O'Connor and Justice Kennedy because we considered them to be too unique for such a limited sample. Watson and Stookey indicate that "O'Connor's status as the first female appointee to the Court overshadowed the concerns of liberals and moderates about her conservative ideology."<sup>56</sup> And, O'Connor was nominated shortly after the Republicans took control of the Senate for the first time in more than 25 years. Further, as Bork has noted, Kennedy's hearings are marked by specific questions related to his constitutional theory—the same type of questions proffered to Judge Bork. The Senate was too emotionally enervated, argues Bork, to duplicate the intense scrutiny it exercised during his hearings.<sup>57</sup> There were several reasons to examine Judge Stevens and Judge Souter; both were nominated by Republican presidents to replace celebrated, if not legendary, liberal justices. Stevens was nominated to replace William O. Douglas and Souter was appointed to replace William Brennan.

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56. Watson & Stookey, *supra* note 47, at 190; see O'BRIEN, *supra* note 2, at 103.

57. BORK, *supra* note 1, at 346.

The data we obtained from our analyses of Stevens and Souter led us to conclude that the approach would be effective in measuring changes in confirmation criteria.<sup>58</sup> As this is an ongoing venture, our objective is eventually to study all of the Justices nominated during the Warren, Burger, and Rehnquist Courts. For this project, we analyzed fourteen nominations: Potter Stewart, Abe Fortas' nomination to be an Associate Justice (hereafter Fortas I), Thurgood Marshall, Fortas' nomination for Chief Justice (hereafter Fortas II), Clement Haynesworth, Harold Carswell, William Rehnquist's nomination to be an Associate Justice (hereafter Rehnquist I), John Paul Stevens, Sandra Day O'Connor, Rehnquist's nomination for Chief Justice (hereafter Rehnquist II), Robert Bork, Anthony Kennedy, David Souter, and Clarence Thomas. We looked at nominations ranging over a thirty year period, nominations by Republican and Democratic presidents, nominations that were controversial and those that were relatively smooth, and both failed and successful nominations. Three nominations are post-Bork while ten precede the Bork nomination.

To conduct the content analysis, we trained students to code the questions asked during confirmation hearings. The students were looking for questions of "character" (CH), questions of "competency" (CP), and questions of "constitutionalism" (CS). Each student was given a codebook illustrating how each of the variables might be contained within the questions he or she would read in the hearings. For example, CH questions would include:

1. Evidence of illegality—whether the nominee was actually convicted or the illegality was simply alleged;
2. Evidence of improper association or influence;
3. Evidence of improprieties; or
4. Direct charges of the nominee's personal prejudice, e.g. racism or sexism.

CP questions might involve:

1. Insufficient legal background or experience;
2. Substandard "performance" on the bench, e.g. missing relevant precedent or failure to do one's work; or
3. Sub-par professional assessment, e.g. A.B.A. report.

CS questions could fall into one of two categories:

1. Specific questions of interpretation:
  - A. Of the nominee's understanding of the Constitution;
  - B. Of the nominee's interpretation of previous cases;

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58. See David Barrett, et al., Address at the 1991 Annual Meeting of the Midwest Political Science Association, Chicago, Illinois (Apr. 17-20, 1991).

- C. Of the nominee's interpretation of hypothetical/future cases;
  - D. Of the nominee's understanding of precedent or doctrine;  
or
  - E. Of the nominee's judicial philosophy.
2. Commentary by the Senators regarding the nominee's judicial philosophy.

A copy of the codebook is provided in *Appendix A*. Within each category are illustrations of what the student might find.

### B. Findings

If one looks at Robert Bork's treatment by the Senate Judiciary Committee, in isolation from the other nominees, the claim that Bork's nomination was an ideological "lynching" appears to be quite plausible. Of the more than 400 questions put to him, 92.6% centered on his constitutional theory. There was virtually no concern for Bork's character or competency, factors considered by many to be the "traditional" areas of inquiry.

Yet, as Table I indicates, when we calculate the percentage of the questions that are coded as "constitutionalism" asked of all the nominees in the sample, quite a different picture emerges. We find that the Bork nomination is not particularly uncommon. In several of the pre- and post-Bork confirmation hearings, the total percentage of constitutional questions exceeded seventy-five percent. Bork is simply not unique when compared with the entire sample of nominees. In fact, Bork's nomination looks remarkably similar to several others in the set. Table I reveals that the types of questions put to Bork are nearly identical to those put to Thurgood Marshall and William Rehnquist I, and they are not radically different from those asked of Sandra Day O'Connor. One might even argue that, had there not been the distinctively political controversy surrounding Abe Fortas' (II) continuing practice of advising President Lyndon Johnson and his receiving privately-raised funds to teach a law school course, while on the Court,<sup>59</sup> the percentage of constitutional questions he received from the Committee could have likewise exceeded ninety percent.

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59. *TRIBE*, *supra* note 3, at 38.

TABLE I  
TYPES OF QUESTIONS PUT TO SUPREME COURT NOMINEES  
BY THE SENATE COMMITTEE ON THE JUDICIARY

Nominee	Comp <sup>1</sup>	Char <sup>2</sup>	Const <sup>1,3</sup>	Other <sup>4</sup>	Total <sup>5</sup>	Outcome <sup>6</sup>
Stewart	7.2% <sup>7</sup> (12) <sup>8</sup>	6.0% (10)	84.9% (141)	1.8% (3)	100% (166)	70-17
Fortas I	11.9% (10)	47.6% (40)	40.5% (34)	0% (0)	100% (84)	Voice
Marshall	3.1% (4)	1.5% (2)	95.4% (124)	0% (0)	100% (124)	69-11
Fortas II	4.8% (23)	18.3% (88)	76.9% (369)	0% (0)	100% (480)	W/drew
Haynesworth	13.4% (82)	79.9% (488)	6.7% (41)	0% (0)	100% (611)	45-55
Carswell	33.1% (112)	62.7% (212)	4.1% (14)	0% (0)	100% (338)	45-51
Rehnquist I	1.7% (7)	5.7% (24)	92.6% (390)	0% (0)	100% (421)	68-26
Stevens	6.7% (13)	13.3% (26)	77.9% (152)	2.1% (4)	100% (195)	98-0
O'Connor	1.3% (4)	7.9% (25)	90.8% (287)	0% (0)	100% (316)	99-0
Rehnquist II	1.3% (7)	40.4% (210)	58.3% (303)	0% (0)	100% (520)	65-33
Bork	1.0% (4)	4.6% (20)	92.6% (400)	1.9% (8)	100% (432)	42-58
Kennedy	2.9% (12)	13.6% (56)	83.5% (344)	0% (0)	100% (412)	97-0
Souter	1.3% (4)	11.3% (35)	77.1% (239)	10.3% (32)	100% (310)	90-9
Thomas	4.7% (33)	16.0% (112)	79.3%* (555)	0% (0)	100% (700)	52-48

<sup>1</sup> Refers to questions coded "Competency."

<sup>2</sup> Refers to questions coded "Character."

<sup>3</sup> Refers to questions coded "Constitutionalism."

<sup>4</sup> Refers to questions not coded in any of the previous categories.

<sup>5</sup> Percentages may not total 100% due to rounding.

<sup>6</sup> Indicates how the full Senate voted on the nomination.

<sup>7</sup> Indicates the percentage of all questions that were of this type.

<sup>8</sup> Indicates the number of questions that were of this type.

\* One coder originally reported for Thomas 64.3% "constitutionalism" and 15% "other." This coder was concerned with the large number of those questions listed as "other" and she described her concerns in a written report. It was clear, from a discussion with the coder, that she was identifying questions as "other" that might be more properly categorized as "constitutionalism" and were grouped as such by other coders.

Table II reinforces the finding that the Judiciary Committee's emphasis on Bork's constitutional theory was neither unique nor unprecedented. It lists those nominees in our sample whose proportion of constitutionally-oriented questions was eighty percent or more. The Table's last column shows which party controlled the Senate at the time of these nominations.

TABLE II  
NOMINEES WITH THE HIGHEST PERCENTAGE OF CONSTITUTIONAL  
QUESTIONS ASKED BY THE COMMITTEE

Nominee	Comp	Char	Const'l	Total	Outcome	Senate <sup>9</sup>
Marshall	3.1% (4)	1.5% (2)	95.4% (124)	100% (124)	69-11	D
Rehnquist I	1.7% (7)	5.7% (24)	92.6% (390)	100% (421)	68-26	D
Bork	1.0% (4)	4.6% (20)	92.6% (400)	98.1%* (432)	42-58	D
O'Connor	1.3% (4)	7.9% (25)	90.8% (287)	100% (316)	99-0	R
Stewart	7.2% (12)	6.0% (10)	84.9% (141)	98.2%* (166)	70-17	D
Kennedy	2.9% (12)	13.6% (56)	83.5% (344)	100% (412)	97-0	D

<sup>9</sup> Refers to the party that controlled the Senate at the time of the nomination.

\* Indicates totals without the "Other" totals from Table I.

Table II indicates that a number of nominees over a thirty year period were questioned extensively on constitutional matters. Moreover, Table II suggests that the Committee's focus on constitutional issues does not depend on other potentially salient variables. For instance, nominees have received a high proportion of constitutional questions when the nominee failed to receive confirmation (Bork), when the nominee had a tough confirmation fight but was eventually confirmed (Stewart, Marshall, Rehnquist I), and when the nominee was unanimously confirmed (O'Connor, Kennedy).

Not only are the Bork hearings similar to those of other nominees, they do not suggest the change in confirmation criteria that some had anticipated. Table III compares Bork with those nominees who followed him. We find that, if there is any consistency that emerges, it is not one patterned after the Bork experience. The Kennedy, Souter, and Thomas hearings are marked by a high percentage of constitutional questions, but the percentage is substantially lower than Bork's. Further, those questions that center on "character" are three to four times higher than in the Bork hearings. The

post-Bork hearings are much more comparable to the Stevens or Fortas II nominations than they are to Bork's.<sup>60</sup>

TABLE III  
TYPES OF QUESTIONS PUT TO ROBERT BORK AND  
SUBSEQUENT NOMINEES BY THE COMMITTEE

<u>Nominee</u>	<u>Comp</u>	<u>Char</u>	<u>Const'l</u>	<u>Other</u>	<u>Total</u>	<u>Outcome</u>
Bork	1.0% (4)	4.6% (20)	92.6% (400)	1.8% (0)	100% (432)	42-58
Kennedy	2.9% (12)	13.6% (56)	83.5% (344)	0% (0)	100% (412)	97-0
Souter	1.3% (4)	11.3% (35)	77.1% (239)	10.3% (32)	100% (310)	90-9
Thomas	4.7% (33)	16.0% (112)	79.3% (555)	0% (0)	100% (700)	52-48

Thus, we maintain that the Bork hearings were unique for those reasons mentioned above: unusual participation by interest groups, heightened media attention, the length and depth of the nominee's testimony before the committee, and the determination of Bork's opponents to keep him off the bench because of his potential to "transform" the Court. His hearings do not appear to be unique in the level of questions focused on his constitutional theory or ideology. More to the point, if what happened to Bork was indeed unique, it is because the Bork nomination was unique. It did not set a trend and radically change confirmation criteria as many observers contend.

It is easy to see, however, why there was a strong perception, especially by proponents of the Judge, that the Bork event was a substantial departure from "traditional" confirmation criteria. If one compares Bork with the other "failed" nominations, Fortas II, Haynesworth, and Carswell, and even with the most recent "highly controversial" nominations—Rehnquist II and Thomas—one will discover obvious differences.

Table IV indicates the dissimilarities. Although Fortas' hearings are marked by a high level of constitutional questions, the total number is more than fifteen percent lower than Bork's ninety-two percent. Further, the number of "character" questions asked of Fortas were nearly four hundred

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60. Our findings for Judge Thomas are based upon those questions put to him prior to the public disclosure of Professor Anita Hill's charge of sexual harassment. They do not include those questions directed to the Judge during his second "appearance" before the Committee. Coding those questions will, of course, push the total number and percentage of questions identified as dealing with "Character" to a much higher level.

percent higher than those put to Bork. The totals for Thomas, in each of the three categories, are very similar to Fortas II. Haynesworth and Carswell, as one might expect, are radically different than the other failed or highly controversial nominees.<sup>61</sup>

TABLE IV  
TYPES OF QUESTIONS PUT TO ROBERT BORK AND OTHER FAILED OR  
HIGHLY CONTROVERSIAL NOMINEES BY THE COMMITTEE

Nominee	Comp	Char	Const'l	Other	Total	Outcome
Fortas II	4.8% (23)	18.3% (88)	76.9% (369)	0% (0)	100% (480)	W/drew
Haynesworth	13.4% (82)	79.9% (488)	6.7% (41)	0% (0)	100% (611)	45-55
Carswell	33.1% (112)	62.7% (212)	4.1% (14)	0% (0)	100% (338)	45-51
Rehnquist II	1.3% (7)	40.4% (210)	58.3% (303)	0% (0)	100% (520)	65-33
Bork	1.0% (4)	4.6% (20)	92.6% (400)	1.9% (8)	100% (432)	42-58
Thomas	4.7% (33)	16.0% (112)	79.3% (555)	0% (0)	100% (700)	52-48

The data from Table IV brings to mind those scholars and commentators who argue that the Bork event is pivotal because, for the first time, the criteria for rejecting the nominee were overtly political. Those who rejected Bork on ideological grounds did not generally endeavor to hide beyond questions of competency or character. Carol Rose maintains that:

[A]mong those earlier candidates who were rejected, it sometimes seemed as if the nonpolitical objections were really a mask or figleaf for the true grounds for opposition—political distrust.

. . . . What seems to have distinguished the Bork nomination is that, in this one instance, the figleaf or mask fell. Bork's views on constitutional law were frankly stated as the grounds for his rejection.<sup>62</sup>

John Maltese argues, similarly, that "[o]pposing the nominee's judicial philosophy was considered illegitimate—even if that was their real reason for trying to block a nomination. Bork stands as something of a milestone since his professional qualifications were not in question. Rather, he was defeated because of his particular approach to interpreting the Constitution."<sup>63</sup> Bork's treatment at the hands of the Senate Judiciary Committee

61. See *TRIBE*, *supra* note 3, at 82; Maltese, *supra* note 1.

62. Rose, *supra* note 5, at 929.

63. Maltese, *supra* note 1, at 340.



was indeed different from that of other failed or highly controversial nominees. His extensive record as a scholar and a jurist made him an inviting target for those who wished to sink his nomination on ideological grounds. However, whether or not Bork was the only, or even the first nominee to be defeated because of his constitutional philosophy is not resolved in Table IV.

The data from Tables I-III does not substantiate a claim that Bork's hearings changed the confirmation process. In fact, one might speculate that even though it is quite common for the Committee to focus upon the nominee's constitutional philosophy, "constitutional philosophy" has limited usage as a weapon in a confirmation fight. Bork may have been a dramatic exception to this rule. The traditional criteria are, perhaps, still ultimately important for those who intend to bring down a particular nominee. Arguably, the figleaf to which Rose referred is back in place.<sup>64</sup> Although many Senators were worried about the politics of Douglas Ginsburg and Clarence Thomas, issues of character surfaced as most important during their respective confirmation battles. The charge of illegal marijuana usage rapidly aborted Ginsburg's nomination. Thomas' confirmation rested, ultimately, upon whether or not the Senate believed him or Anita Hill. Thus, even if interest groups and others plan to "Bork" a particular nominee, they might be well advised to uncover some evidence of incompetence or absence of character on the part of their target.

#### IV. CONCLUSION

This article has set forth quantitative analyses of the nature of questions and constitutional commentaries in the Senate Judiciary Committee's confirmation hearings of fourteen Supreme Court nominees. Our findings indicate that there has been no obvious shift from the pre-Bork era to the post-Bork era. The heavy emphasis placed upon Bork's constitutional philosophy appears to be neither unprecedented nor unique to Bork. The kinds of questions asked by the Senate Judiciary Committee in a variety of confirmation hearings look very much like those presented to Robert Bork, regardless of which party controlled the Senate or whether the nominee was controversial or a veritable certainty for confirmation.

When looking at Bork's confirmation alone, it is easy to see why there is a perception, particularly among Bork's supporters, that his confirmation hearings were unusual. In our sample of those nominees whose confirmations have been rejected, Bork was explicitly defeated because of his partic-

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64. See Rose, *supra* note 5, at 929-30.

ular constitutional theory. Whether or not Bork was the only nominee to be rejected on constitutional grounds is not completely clear.

Beyond assessing the impact of the Bork nomination, we have also developed a model for determining, on a comparative basis across time, whether or not the Committee has altered its approach to judging Supreme Court nominees. In delineating between questions concerning a nominee's constitutionalism, character, and competency, the model offers scholars a way of continuing to assess the nature of the criteria employed by the Committee in judging whether or not a nominee is qualified to assume the duties of a Justice on the nation's highest court.

Our model for gauging change in Senate confirmation proceedings can impact upon a greater body of research than simply evaluating the implication of Bork's experience. Studies that might employ the model include the following: (1) those assessing the impact on Senate proceedings of extra-congressional influences, such as the 17th Amendment which provided for the direct election of Senators; (2) those focusing on internal congressional influences, such as the institutional reforms that passed the Congress in the early-to-mid 1970s; (3) those looking to the types of questions asked of controversial versus noncontroversial nominees; (4) those looking to the types of questions posed to nominees in the wake of landmark Supreme Court decisions; (5) those seeking to compare the types of questions asked of a nominee placed before the Senate to be an Associate Justice and later to be Chief Justice; and (6) those investigating the impact of "Senate enervation"—the claim that nominees who follow unusually bruising confirmation hearings experience an easier review by the Senate Judiciary Committee. Although this study provides a preliminary application, the model can be used to conduct a more exhaustive study of the impact of the Bork nomination—or to investigate one of the other research questions posited above.

APPENDIX A  
CHARACTER, COMPETENCY, AND CONSTITUTIONALISM:  
DID THE BORK NOMINATION REPRESENT A FUNDAMENTAL  
SHIFT IN CONFIRMATION CRITERIA?

CODEBOOK:

Variables and Samples One Might Find in the Hearings: (All examples are based upon partial fact and partial fiction.)

CH	=	Character
CP	=	Competency
CS	=	Constitutionalism

CHARACTER:

1. *Evidence of Illegality—whether actually convicted or simply alleged:*

Senator Fleming: "I hate to raise this issue, but there are reports that the nominee smoked the drug in the presence of other law professors and with students. Mr. Chairman, I simply feel that a man aspiring to the Supreme Court ought to have an unassailable respect for the rule of the law."

2. *Evidence of improper association/influences:*

Senator Mahoney: "Isn't it true, Justice Mason, that you continued your close relationship with the President even after you were confirmed as an Associate Justice to the United States Supreme Court? Isn't it true that you acted as an adviser on almost a daily basis even on issues that might one day end up before the Court?"

3. *Evidence of improprieties:*

Senator Bradley: "His opponents argue, quite properly, that he should have disqualified himself from those cases that affected the companies in which he owned stock, or sold his stock."

Deputy Attorney General Jones: "Yes, it is true that the nominee had invested over \$140,000 in a cable company, and yes, it is true that when he worked for the Justice Department he handled matters involving the cable industry."

4. *Direct charges of personal prejudice, e.g. racism, sexism:*

Professor Whiteman: "Judge Danley, however, openly avowed white supremacy, even as the national leadership of his party was struggling to enact the President's civil rights program."

Senator Burns: "Isn't it true, Judge Ripley, that you once declared: 'I yield to no man as a fellow candidate or as a fellow citizen in the firm, vigorous

belief in the principles of White Supremacy, and I shall always be so governed.' ”

### COMPETENCY:

#### 1. *Legal background or experience:*

Senator Osbourne: “Mr. Chairman, the nation is entitled to have a man who is of wide experience and proper preparation both academically and professionally. I do not know that there is any record of any present member of the Supreme Court that is as wide and as deep as the experience of this nominee in the field of jurisprudence. He has experience on three levels of our judicial systems.”

Senator Ernesto: “The nominee has the most slender credentials of any Supreme Court nominee in this century. He’s not fit to carry Judge West’s law books.”

#### 2. *“Performance” on the bench, e.g. missing relevant precedent, failure to do work:*

Senator Allen: “While on the appellate bench, Judge Mitchell continued to speak around the country, mostly to right-wing groups. In fact, he sometimes gave so many speeches that he neglected his work on the court. He would simply tell the chief judge that this was his ‘speech month’. Little would be gotten out of him that month.”

Senator Karlas: “Judge Smitt’s legal opinions contain errors of grammar and syntax and seem devoid of intellectual distinction. What could one expect? He had virtually no experience in dealing with federal or constitutional issues prior to taking his seat on the bench.”

#### 3. *Professional assessment, e.g. ABA report:*

Professor Terry: “Senator, I have a list of 1,925 law professors—some 40% of all full-time law faculty—who signed a letter against Judge Cronin. They represent faculty members at 90% of the ABA accredited law schools.”

Senator Shea: “And remember, Mr. Chairman, that the ABA gives candidates one of four ratings: exceptionally well qualified, well qualified, qualified, and not qualified. That the nominee received the rating “qualified” only means he got the lowest rating he could possibly have and still be taken seriously as an aspirant to the High Court.”

## CONSTITUTIONALISM:

1. *Specific questions of interpretation:*A. *Of the nominee's understanding/assessment of the text:*

Senator Rossiter: "Is it your understanding, Judge Simpson, that the Ninth Amendment is not a place where a thoughtful jurist might look to find unenumerated rights? If that's true, Judge Simpson, does the Ninth Amendment mean anything?"

B. *Of the nominee's interpretation of previous cases:*

Senator Cohen: "But in your opinion, in *Goldrick v. McCarthy*, you indicated that a judge must take into consideration the social conflicts whirling around us when trying to apply the Constitution to fact. Is that not correct?"

C. *Of the nominee's interpretation in hypothetical/future cases:*

Senator Smith: "How would you apply the Equal Protection Clause to a case involving set-aside programs for women working in public educational programs?"

D. *Of the nominees understanding of precedent or doctrine:*

Senator Shanley: "Something has been said about whether or not judges are bound by stare decisis. That is a very broad question, but would you care to comment on it? What do you think of stare decisis?"

E. *Of judicial philosophy:*

Senator Grossman: "You've said that you think that the Supreme Court should not be a continuing constitutional convention. Does that mean you are a strict constructionist and bound by the words of the text or original intent?"

Professor Cartier: "An honest evaluation of the nominee's record, in 322 appellate cases, would lead one to conclude that he understands the Constitution to be a living document—one that enables judges to afford protection to those least able to protect themselves in the political process."

2. *Commentary by the Senators regarding the nominee's judicial philosophy:*

Senator Wells: "I am afraid that if confirmed Justice Harris would turn back the clock and savagely overturn the cases safeguarding the rights and liberties of minorities and women. We are one Justice away from injustice."

Senator Kennebrew: "With all your ability, I just wish you had devoted even a little of your talent to advancing the equal rights rather than criticizing so many of the decisions protecting rights and liberties. What good is your legal philosophy if it cuts against the poor and helpless. Lawyers can always make technical points, but justice ought to be fair."

#### POTENTIAL AREAS OF OVERLAP (EXAMPLES):

1. Questions regarding constitutional doctrine, e.g. a nominee's understanding of the Equal Protection Clause, might be a way to disguise charges of prejudice. Unless further testimony leads to a *direct* charge of prejudice, e.g. racism or sexism, code the material CS—"constitutionalism."
2. One might think a candidate is unfit to do the job because of character or constitutionalism. For example, "The Senate should reject the nomination of Judge Walter Downfield because of his continuing unwillingness to perform his judicial duty." This seems like it might be a question of competency, but the next sentence explains why the Senator feels Judge Downfield is unwilling to perform his duty: "Downfield's early and passionate support for white supremacy puts a heavy burden on this committee to assess his ability to rise above his early prejudices and impartially enforce the law." Clearly the Senator is not questioning Downfield's ability to do the job, but rather is questioning whether Downfield's previous history of racism will enable him to be a fair judge. Although the Senator may feel that character is necessary for a justice to be able to perform judicial duties, and the Senator is probably right, that is not how we are using the variable CP—"competency." Thus, the Senator's remarks are more accurately a question of CH—"character."

Likewise, a Senator might challenge a nominee's competency based upon the nominee's judicial philosophy. The Senator might well believe that unless a nominee shares a particular theory of the Constitution, the nominee is not fit/competent to serve. This might also explain why a candidate receives a lower ABA rating: not because of a lack of expertise, but because of a judicial philosophy which some of the members of the ABA committee find unacceptable. Again, the ABA committee or a given Senator might express their chagrin with the candidate's judicial philosophy by reacting to the nominee's ability. That, however, is not our understanding of competency. Thus we would ask you to code such data as CS—"constitutionalism."

If in doubt, code the first question/remark CP and then follow the questioning. Further testimony should spell out if it is CH or CS. If so, code the data accordingly.

